

STATE OF MICHIGAN
COURT OF APPEALS

DORETHA RAMSEY JACKSON,

Plaintiff-Appellee,

v

HARPER HOSPITAL,

Defendant-Appellant.

UNPUBLISHED

September 12, 2006

No. 262466

Wayne Circuit Court

LC No. 04-402087-NI

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Plaintiff reported to the hospital after experiencing chest pains. She was admitted for observation and the performance of laboratory tests. Plaintiff was on her way to the restroom when her heart began to race. After this incident, hospital staff advised plaintiff that she was to remain in bed and the bedrails were raised. During the night, plaintiff alleged that a member of the nursing staff released the bedrails when she took plaintiff's vital signs. At approximately 3:00 a.m., plaintiff testified that she woke up on the floor of the room because the bedrails had not been raised after the nurse took her vital signs during the night.

Plaintiff filed a complaint alleging ordinary negligence, not medical malpractice. Consequently, plaintiff did not provide a notice of intent to file a lawsuit or an affidavit of merit. Defendant moved for summary disposition of the complaint, alleging that plaintiff did not comply with the medical malpractice statute and the statute of limitations for filing a medical malpractice action had expired. Plaintiff opposed the motion for summary disposition, alleging that she need not comply with the medical malpractice statute and present an expert opinion because her cause of action was one of ordinary negligence. The trial court agreed and denied defendant's motion for summary disposition. We granted defendant's application for leave to appeal.

Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). When examining a motion for summary disposition based on MCR 2.116(C)(10), the

trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). If the moving party supports its initial burden with documentary evidence, the burden shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). If the opposing party fails to create a material factual dispute, the motion for summary disposition is properly granted. *Id.* The trial court's determination regarding the proper classification of a claim as ordinary negligence or medical malpractice is reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419, 684 NW2d 864 (2004).

In *Bryant, supra*, the plaintiff's decedent was a resident of a nursing home that provided twenty-four hour care because of her extensive health problems. The decedent had no control over her locomotive skills, which made her prone to slide uncontrollably. This lack of control made the decedent a risk for suffocation by "positional asphyxia", a position of the body that prevents proper breathing. Because of the risk, the defendant's medical doctor authorized the use of various physical restraints, which included bed rails, wedges, bumper pads, and a restraining vest, to prevent the decedent from sliding out of the bed. *Id.* at 415-416. Despite these precautions, nursing assistants found the decedent lying close to the bed rails, tangled in her restraining vest, gown, and bed sheets. They untangled her, attempted to position wedges to prevent her from slipping between the mattress and bed rail, and alerted the supervisor regarding the deficiencies with the restraints. The next day, the decedent was found with the lower half of her body on the floor, and her head and neck under the bedside rail in a manner that prevented her from breathing. The decedent was transported to the hospital, but was later taken off life support and died. *Id.* at 416-417.

The plaintiff's amended complaint alleged that the defendant was liable for failing to provide an accident-free environment, failing to train its employees regarding the risk of positional asphyxiation, failing to inspect the bed and restraints, and failing to protect the decedent from harm after finding her entangled. *Id.* at 417-418. The Supreme Court held that the determination of whether a medical malpractice or ordinary negligence claim was appropriately pursued involved a two-step analysis:

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only " 'within the course of a professional relationship.' " Second, claims of medical malpractice necessarily "raise questions involving medical judgment." Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." Therefore, a court must ask two fundamental questions in determining whether a claims sounds in ordinary negligence or medical malpractice: (1) whether the claims pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant, supra* at 422 (citations omitted).]

The Court then examined each of the allegations raised in the amended complaint to determine whether the action was based on medical malpractice or ordinary negligence. The Court held that the claim for failing to provide an accident free environment was an assertion of strict liability that was not recognized as a claim for medical malpractice or ordinary negligence. *Id.* at 425-426. With regard to the failure to train allegation, it was concluded that a medical malpractice claim was raised because the training of employees with regard to assessing the risk of positional asphyxia involved an exercise of professional judgment. *Id.* at 427-429. The failure to inspect the bed claim also raised a claim of medical malpractice. In so holding, the Court noted that the claim was not based on the failure to check the decedent's bedding arrangement, but rather to recognize that her bedding arrangement posed a risk of asphyxiation. The risk of asphyxiation varied from patient to patient and was also contingent upon the individual patient's medical history and treatment plan. The risk assessment involved, because of the decedent's medical condition, presented an issue beyond the common knowledge, experience, and understanding of the jury. Accordingly, the claim sounded in medical malpractice, not ordinary negligence. *Id.* at 429-430.

Lastly, it was alleged that the defendant failed to take steps to protect the decedent after the first time she was discovered entangled between the bed rails and the mattress. The Court held this claim sounded in ordinary negligence because it alleged that the defendant knew of the hazard, but did not correct it. Moreover, the fact-finder could rely on common knowledge and experience to determine whether the defendant should have made an attempt to reduce a known risk of imminent harm to one of its residents. *Id.* at 430-431.

In the present case, plaintiff raised the following allegations in its complaint of ordinary negligence:

- a. failing to train or supervise its employees in the proper use of safety precautions/while its patients are being examined or medically treated.
- b. failing to adequately insure that safety railings are re-secured after its patients are examined or treated by hospital staff.
- c. failing to insure the safety and security of all patients being treated or examined in its facilities.

With regard to the failure to train claim, we conclude that the allegations raised comprise a medical malpractice action. The claim is raised in the context of a professional relationship between a patient and members of defendant hospital who treated plaintiff. The second question involves whether the acts of negligence raised present issues that are within the common knowledge and experience of the jury or whether it involves an issue of medical judgment. In order for the fact-finder to analyze this claim, it would be required to be advised of the proper safety precautions and whether the safety precautions employed vary based on the individual patient care involved. Accordingly, the trial court erred in classifying this claim as one of ordinary negligence instead of medical malpractice.

However, we note that the trial court correctly denied the motion for summary disposition with regard to this claim. The *Bryant* Court addressed the propriety of dismissal of claims

addressing the distinction between medical malpractice and ordinary negligence by, in essence, providing for limited retroactivity of the decision:

The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris* [*v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999)]. Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, *for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim.* MCR 7.316(A)(7). However, in future cases of this nature, in which the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are advised as a matter of prudence to file their claims alternatively in medical malpractice and ordinary negligence within the applicable period of limitations. [*Bryant, supra* at 432-433 (emphasis added).]

Review of the lower court record reveals that plaintiff's complaint was filed on January 26, 2004. The *Bryant* decision was rendered on July 30, 2004. Thus, plaintiff's complaint was pending at the time *Bryant* was decided. Accordingly, the claim for medical malpractice may proceed to trial along with plaintiff's ordinary negligence claim. *Id.*

However, the trial court properly denied the claim for summary disposition with regard to the failure to re-secure the bed railings after examination of a patient. Again, the first criterion is satisfied because a professional relationship between a patient and medical personnel is at issue. However, this issue does not necessarily raise a question involving medical judgment, but rather, comes within the common knowledge and experience of the jury. "No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient." *Bryant, supra* at 431.¹ It should be noted that plaintiff does not allege that her medical condition required that specialized bed railings or other restraints be imposed based on her medical condition. Rather,

¹ Relying on *Bryant, supra*, defendant alleges that the use of bed rails is based on an individualized treatment plan and therefore requires an assessment of medical judgment. In *Bryant*, the question involved an assessment of medical judgment because the issue did not address the mere failure to employ such a device. Rather, the issue involved whether the use of the bed rail created a risk of entrapment to decedent in light of her lack of control over her locomotive skills and the danger of positional asphyxia. The decedent's medical conditions and their relationship to the use of restraints were clearly at issue. In the present case, plaintiff does not allege that her medical conditions had an impact on the type of restraint utilized and the risk involved. Plaintiff merely alleges that the failure to continue to use the railing after taking vital signs constituted ordinary negligence.

plaintiff merely alleges that it was error to fail to return the bed railings after a check of her vital signs.

With regard to the last claim, alleging the failure to protect all patients, the trial court erred in denying defendant's motion for summary disposition of this claim. Similar to *Bryant's* "accident-free environment" claim, plaintiff alleges a failure to ensure the safety and security of all patients, but does not correlate the claim to any particular breach. Rather, this merely raises a claim of strict liability. Accordingly, dismissal of this claim was proper.

Alternatively, defendant alleges that the trial court erred in denying its motion for summary disposition because plaintiff failed to meet the burden of opposing the motion for summary disposition with documentary evidence. *Quinto, supra*. However, the analysis of the proper determination of a claim as ordinary negligence or medical malpractice involves a two-step *legal* inquiry that is reviewed de novo on appeal. *Bryant, supra*. Defendant further alleges that the trial court erred in denying its motion for reconsideration after it submitted the affidavit of a nurse delineating the medical judgment involved in utilizing bed restraints. We disagree. A trial court's decision regarding a motion for reconsideration is reviewed for an abuse of discretion. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). It is not an abuse of discretion to deny a motion for reconsideration based on facts or legal theory that could have been pleaded or argued before the trial court's original order. *Id.* Furthermore, the duty to interpret and apply the law presents an issue for the courts, not the parties' expert witnesses. *Hottmann v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997). Accordingly, the delayed presentation of an affidavit from a nurse has no bearing on this case which involves a two-step legal determination to determine whether a medical malpractice or ordinary negligence claim can be maintained based on a specific set of factual allegations.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood